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IN THE

Supreme Court of the United States

October Term, 1940

No. 128

EMIL MOSBACHER,

Petitioner,

v.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CLAIMS

REPLY MEMORANDUM FOR PETITIONER

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August, 1940.

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INDEX

PAGE

I. There is no good reason why, on the facts of this case, the question presented by the petition for certiorari should not be reviewed by the Court 2

II. Neither the Minnesota Tea case nor any other denies petitioner's right to review in this Court on the facts of this case 4

III. The Government has previously contended that the Court below in this case decided the same issue as did the Second Circuit in the Neuberger case 6

Conclusion 7

CASES CITED:

Blair v. Oesterlein Co., 275 U. S. 220, 225 2

Friend v. Talcott, 228 U. S. 27, 36 5

Grant Bros. Construction Co. v. United States, 232 U. S. 647, 660 5

Helvering v. Minnesota Tea Co., 296 U. S. 378, 380 .... 5, 6

J. M. Robinson & Co. v. Belt, 187 U. S. 41, 50 2

Klauber v. Commissioner,, 34 B. T. A. 998 3

PAGE

Lamb v. Cramer, 285 U. S. 217, 222 5

Mahler v. Eby, 264 U. S. 32, 45 5

Neuberger v. Helvering, No. 5, October Term 1940 ....1, 6, 7

Pierce v. United States, 255 U. S. 398, 405-6 5

United States v. Tennessee & Coosa R. Co., 176 U. S. 242, 256 5

United States v. Williams, 278 U. S. 255, 256 5

Weems v. United States, 217 U. S. 349, 362 5

West v. Edward Rutledge Timber Co., 244 U. S. 90, 99, 100 5

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The Government's memorandum in opposition concedes that the question presented by the petition for certiorari is the same as that now pending before the Court in *Neuberger* v. *Helvering*, No. 5, October Term 1940 (whether individual security losses may be offset against partnership security profits).

The Government concedes that the court below applied the rule of the *Neuberger* case, and that under such circumstances it "would ordinarily be inclined to acquiesce in the petition". It opposes certiorari with some doubt because of a "procedural impediment" said to arise from petitioner's failure to have attacked the rule of the *Neuberger* case in the court below.

The Government cites no authority which holds such failure to be an impediment where, as here, the record presented the point, the Government brief argued it, and

the court decided it, but contents itself with a reference to one "compare" citation, which is not at all in point (see II below).

This reply memorandum will briefly demonstrate that (1) there is no good reason why, on the facts of this case, the question presented by the petition for certiorari should not be reviewed by the Court; (2) neither the *Minnesota Tea* case, cited by the Government, nor any other, denies petitioner's right to review in this Court on the facts of this case; and (3) the Government's contention is belated, in view of its recent assertion that the court below *did, in this case, decide* the same question as is now before the Court in the *Neuberger* case.

I.

There is no good reason why, on the facts of this case, the question presented by the petition for certiorari should not be reviewed by the Court.

The rule frequently stated by this Court is that it will not ordinarily review questions not raised *or passed upon* below. *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225. There is no case in which this Court has refused to review a point which *was* passed upon below (Point II *infra*).

The purpose of the rule is clear, justice to subordinate courts requiring "that their alleged errors should be called directly to their attention, and that their actions should not be reversed upon questions which the astuteness of counsel in this Court has evolved from the record". *J. M. Robinson & Co.* v. *Belt,* 187 U. S. 41, 50.

As the record in the court below is replete with references to the issue now before this Court, and as that court

passed on the point, both the rule and the reason therefor are inapplicable to this case:

A. The question presented by the petition to the Court of Claims was whether on the facts set forth petitioner was entitled to recover (R. 1-5). He could recover on either of two grounds: (1) If individual security losses could be offset against partnership security profits; or (2) if the security profits in this case were individual rather than partnership profits. The petition requested that the deduction be permitted, without limiting the reasons therefor.

B. Petitioner's claim for refund presented both points (Finding 6, R. 8-9).

C. The court below found that the parties had by agreement suspended the statute of limitations in this case awaiting the decision of the Circuit Court of Appeals in *Klauber* v. *Commissioner* [34 B. T. A. 998], the sole issue in which was the right to offset individual security losses against partnership security profits (Finding 5, R. 8).

D. The court below found that the Commissioner rejected the claim for refund on the ground that individual losses could not be offset against partnership profits (R. 9).

E. The Government brief below recognized that the right to such setoff was involved in the case, urging that the *Johnston* and *Klingenstein* cases had settled the rule that the profits, treated as partnership profits, could not be offset by individual losses (Government brief below, p. 55).

F. The court below, four of the judges of which had also sat in the *Klingenstein* case, cited and stated the rule of the

Klingenstein and *Johnston* cases in its opinion (R. 14). The concluding paragraph of the opinion adopts the rule of those cases, the court holding that there was a partnership "and, *accordingly*, that plaintiff is not entitled to the deduction" (R. 16, italics ours). The court could not have reached this conclusion without following the rule of the *Klingenstein* and *Johnston* cases.

Thus the record in the court below is replete with references to the issue now before this Court, the question was specifically called to the court's attention by the Government brief, and the court below decided the point and referred to it in its opinion. Under these circumstances, the rule that questions not raised or passed upon below are not considered here has no application to this case.

II.

Neither the *Minnesota Tea* case nor any other denies petitioner's right to review in this Court on the facts of this case.

A careful search has failed to reveal a single case in which this Court has refused to review a question of law because of petitioner's failure to have argued it below, where the record presented the point, respondent discussed the point in its brief, and the court below passed on the point by express reference thereto in its opinion.

Even the rule that this Court will not consider questions *not* passed upon below has in practice been subjected to many exceptions. The rule is not a rigid one, and confers a discretion which may be exercised at any time no matter what may have been done before.

At one time this Court's statement of the rule that it will

not consider matters not passed upon below excepted "fundamental" and jurisdictional points. *Grant Bros. Construction Co.* v. *United States,* 232 U. S. 647, 660.

But in *West* v. *Edward Rutledge Timber Co.,* 244 U. S. 90, 99, 100, the Court considered points not raised or passed upon below "in deference to the earnestness of counsel," dismissing as "artificial" the distinction made in the earlier cases between fundamental and jurisdictional points, and other points.

This Court has reversed a Circuit Court of Appeals for refusing to consider an error which had not been properly raised. *Pierce* v. *United States,* 255 U. S. 398, 405-6. It has affirmed a Circuit Court of Appeals which reversed the trial court on a ground improperly presented. *Lamb* v. *Cramer,* 285 U. S. 217, 222; *Friend* v. *Talcott,* 228 U. S. 27, 36.

In other types of cases, this Court has reversed because of errors not raised below, even though not assigned as error in this Court. *United States* v. *Tennessee & Coosa R. Co.,* 176 U. S. 242, 256; *United States* v. *Williams,* 278 U. S. 255, 256; *Mahler* v. *Eby,* 264 U. S. 32, 45; *Weems* v. *United States,* 217 U. S. 349, 362.

Into this pattern of cases, *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 380, fits perfectly. This is the only case cited by the Government to establish the "procedural impediment" to review of this case. The question in the *Minnesota Tea* case was whether the acquisition by one corporation of substantially all the properties of another was a reorganization for tax purposes. It was stipulated by the parties in the Board of Tax Appeals that there had been a transfer by the one corporation of all its assets to the other.

No point to the contrary was raised in the Board of Tax Appeals nor before the Circuit Court of Appeals. In its petition for certiorari, the Government for the first time took

the position that there had not been an acquisition of substantially all the properties. This Court properly refused to consider the point, saying (296 U. S. at 380):

> "The petition also stated that, as the taxpayer made an earlier conveyance of certain assets, the later one, here in question, of what remained to the Grand Union Company did not result in acquisition by one corporation of substantially all property of another. This point was not raised prior to the petition for certiorari and, in the circumstances, we do not consider it."

The question had not been presented to either of the lower tribunals, and was one of fact, as to which the stipulation of facts contradicted the new contention.

Thus the decisions of this Court lend no support to the Government's "procedural impediment" argument in a case where, as here, the point was presented to the lower court by the record, was discussed in the Government brief, and passed on by the court by express reference in its opinion.

III.

The Government has previously contended that the Court below in this case decided the same issue as did the Second Circuit in the *Neuberger* case.

In opposing certiorari in the *Neuberger* case, the Government filed a memorandum with this Court in February, 1940, on page 2 of which appears the following comment:

> " * * * the precise question involved in the present case was decided against petitioner's position by the Court of Claims less than a month prior to the decision in

the *Craik* case. *Mosbacher* v. *United States,* decided January 8, 1940."

In a footnote, the Government supported this statement by quoting the portion of the *Mosbacher* opinion which cites the *Klingenstein* and *Johnston* cases (see R. 14). Thus the Government opposed certiorari in the *Neuberger* case on the ground that the court below in this case *had decided* the point, but now opposes certiorari in this case on the ground that there is a "procedural impediment" to the decision of the point.

CONCLUSION.

The question whether petitioner's individual security losses may be offset against partnership security profits is properly presented and is the same question as is now before the Court in the *Neuberger* case. Hence, certiorari should be granted. But if there is any lingering doubt in the Court's mind as to whether the issue of law is properly before the Court, then, there being no decisive authority on the procedural point, justice requires that petitioner have an opportunity fully to brief and argue the procedural point in an argument on the merits. Justice will not be served by accepting the thin technical argument of the Government, unsupported by previous judicial decision, without giving petitioner an opportunity to be heard.

Respectfully submitted,

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August, 1940.